No. 92-833

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KEVIN ALBRIGHT,

Petitioner,

—v.—

ROGER OLIVER, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF ILLINOIS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization of nearly 300,000 members; the ACLU of Illinois is one of its statewide affiliates. Since its founding in 1920, the ACLU has been dedicated to preserving and defending the principles of individual liberty embodied in the Constitution. Those principles are primarily designed to structure the relationship between the individual and the state in a manner that affords proper protection for those rights and ensures against any abuse of power by state officials. Accordingly, the ACLU has consistently argued in this and other courts that 42 U.S.C. §1983 can and should be broadly interpreted to defend individual rights against the misuse of state power.

Because we believe that the decision below implicates important interests with respect to the reach and meaning of §1983, we submit this brief *amicus curiae* in the hope that it will assist the Court's resolution of this case.

STATEMENT OF THE CASE

The case involves a particularly offensive misuse of the state criminal justice machinery. At the time of the events in question, petitioner Kevin Albright was a senior at Western Illinois University in Macomb, Illinois, with no criminal record or history. In March 1987, respondent Roger Oliver was a detective working for the police department of Macomb, Illinois. In the spring of 1987, Oliver hired Veda Moore, a cocaine addict, to act as an informant for him, and agreed to pay her $100 to $150 for each drug dealer from whom she reported she had purchased narcotics. Over the next few months she

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

reported that she had purchased cocaine from more than fifty individuals.

Ms. Moore's information about these alleged purchases did not lead to a single successful prosecution. The "cocaine" that she had allegedly purchased and then turned over to police authorities turned out in many instances to be baking soda. As the court below noted, this record strongly suggests that "Moore had bought some cocaine either from she knew not whom or from someone she was afraid to snitch on . . . that she consumed it and replaced it with baking soda, and that she had then picked a name from the phone book at random" to report as a dealer, in order to cover up her consumption of the cocaine she had purchased. *Albright v. Oliver*, 975 F.2d 343, 345 (7th Cir. 1992).

One of the individuals from whom Ms. Moore allegedly purchased cocaine was named John Albright, Jr. After a laboratory test, the "cocaine" turned out to be harmless baking soda. Based upon Ms. Moore's testimony, a grand jury nevertheless indicted John Albright for sale of a "look alike" substance. When the police came to arrest Mr. Albright, they discovered that he was a retired pharmacist unlikely to have purchased any illegal substance. Detective Oliver then asked Mr. Albright whether he had any sons, assuming that perhaps his informant had confused the elder Mr. Albright with one of his sons. When he learned that Mr. Albright had two sons, one of whom was also named John, he altered the name on the arrest warrant from "John Albright, Jr." to "John David Albright."

It turned out, however, that John David Albright lived in Chicago and had an alibi for the day when the cocaine sale allegedly occurred. Instead of reexamining the veracity of his informant or making any further investigation of the situation, Detective Oliver called his informant (who by then had moved to Florida) and simply asked her whether she had confused the elder Mr.

Albright with his other son, petitioner Kevin Albright, a student at Western Illinois University. She readily agreed that Kevin was the Albright with whom she had dealt.

Detective Oliver then scratched John David Albright's name from the arrest warrant and substituted Kevin's name. When petitioner Kevin Albright heard that the police were looking for him, he turned himself in and was arrested and arraigned. He had to post bond in the amount of $3,500, which he did by paying a nonrefundable fee of 10% of that amount to the court. He was also restricted in his movements; under the terms of the bond, he could not leave the state without permission of the court. As a result, he was not able to go to St. Louis for a job interview while the charges were pending.

Eventually all the criminal charges against petitioner were dismissed.[2] Petitioner then brought this action in federal court under 42 U.S.C. §1983. His claim was rejected by the lower courts, which held as a matter of law that §1983 did not permit recovery against state officials for malicious prosecution. According to the Seventh Circuit, even if the facts would justify a state common law claim for malicious prosecution, no constitutional claim could be brought. The court reasoned:

> The medley of harms that a malicious prosecution inflicts, when as in this case, the defendant is exonerated before any punishment is imposed . . . is similar to that inflicted by defamation, which by impairing a person's reputation not only embarrasses

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[2] The informant, Veda Moore, was found to have purchased cocaine with the money given her by respondent Oliver. 957 F.2d at 345.

> and even outrages him but also undermines his ability to make favorable transactions, whether business or personal, thereby subjecting him to costs pecuniary or nonpecuniary or both.

975 F.2d at 345. The Seventh Circuit then concluded that, under this Court's ruling in *Paul v. Davis*, 424 U.S. 693 (1976), no constitutional violation occurs when only reputational damage has been inflicted.

SUMMARY OF ARGUMENT

Contrary to the view of the Seventh Circuit, this is not a case about "reputational injury," it is a case about the abuse of government authority. The complaint alleges that persons acting under color of law deliberately and maliciously abused the state's criminal process. Petitioner further alleges that he suffered clear and foreseeable consequences as a result. These allegations state a cause of action under 42 U.S.C. §1983, which was adopted by a Congress specifically concerned about judicial breakdowns on the local level.

The history, background and purpose of §1983 require recognition of a malicious prosecution constitutional tort. The abuse of power connected with the deliberate bringing of false charges against an individual was precisely the type of evil which the 42d Congress hoped to eliminate.

Furthermore, the deliberate and malicious bringing of false criminal charges by a law enforcement officer involves more than reputational damage. Such outrageous conduct is constitutionally prohibited by the substantive provisions of the Due Process Clause. In addition, the existence of pending criminal charges involves a significant loss of liberty for the person charged. This loss of liberty fits comfortably with the remedial scope of §1983.

ARGUMENT

I. THE HISTORY, BACKGROUND AND PURPOSE OF SECTION 1983 SUPPORTS THE RECOGNITION OF MALICIOUS PROSECUTION AS A CONSTITUTIONAL TORT

The history and purpose of §1983 have been examined by this Court in minute detail. *See e.g., Wilson v. Garcia*, 471 U.S. 261 (1985); *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Monroe v. Pape*, 365 U.S. 167 (1961). Based upon that review of the legislative history, it is now commonly agreed that §1983 was adopted in response to what Congress perceived as a generalized breakdown in the administration of justice in the Southern states following the Civil War. In particular, Congress was deeply concerned by evidence showing that Southern officials had been "unable or unwilling" to stem the tide of Klan violence through vigorous enforcement of state criminal laws.

This case presents the reverse situation. Petitioner's claim is that respondent has misused the criminal process rather than ignored it. In this context, however, there is no reason to distinguish between sins of commission and sins of omission. To accept the argument that §1983 does not reach the conduct described in petitioner's complaint, it is necessary to believe that the 42d Congress would have been undisturbed by evidence that Southern officials were falsely prosecuting innocent victims of Klan violence, as well as failing to bring legitimate prosecutions against Klan members. Merely to state the proposition is sufficient to refute it.

Both the legislative debate that preceded passage of §1983, and this Court's decisions interpreting the statutory language, repeatedly refer to the right of each citizen to demand that the government execute the laws in a faithful and impartial manner. *E.g., Monell*, 436 U.S. at 670. Undoubtedly, government officials who tolerate

vigilantism have failed in that obligation. But it is equally clear that government officials who convert the power to prosecute into a power to persecute have also violated their constitutional duty. In either event, there has been what one supporter of §1983 aptly described as a "defect in the administration of the laws . . . ." Cong. Globe, 42d Cong., 1st Sess. 505 (1871)(remarks of Sen. Pratt), *quoted in Monroe*, 365 U.S. at 178.

Maladministration of the laws can have many consequences. A failure to prosecute can lead to injury or death, as it frequently did during the Klan rampages that led to enactment of §1983. A malicious prosecution can lead to false arrest, false imprisonment and emotional distress.[3] Whatever the consequences, however, the core of the constitutional complaint is the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law . . . ." *United States v. Classic*, 313 U.S. 299, 326 (1941).

The duty of state officials to administer the law fairly and impartially is essential to the relationship between individuals and the government that lies at the core of the Fourteenth Amendment. The contours of that relationship were spelled out by this Court in *Monell*. Quoting again from the legislative history of §1983, this Court noted that the drafters of the Fourteenth Amendment clearly believed that it imposed an obligation on government to protect its citizens. 436 U.S. at 658. That obligation is often enforced through the criminal justice system.

A criminal justice system that persecutes the innocent through baseless prosecutions is not fundamentally

[3] The court's erroneous conclusion that there was no loss of liberty in this case because petitioner was not imprisoned or otherwise restricted in his freedom of movement is discussed in Point II below.

different than a criminal justice system that permits persecution of the innocent by private vigilantes, like the Ku Klux Klan. What the government may not do indirectly, it surely may not do directly.

II. AN ALLEGATION THAT PERSONS ACTING UNDER COLOR OF LAW MALICIOUSLY ABUSED THE CRIMINAL PROCESS STATES A CAUSE OF ACTION UNDER §1983

The decision below approached the key legal issue presented by this case -- whether malicious prosecution by a state actor violates the Constitution -- from the wrong perspective. Furthermore, it made a series of faulty deductions that eventually led it to the wrong conclusion.

At the heart of the circuit court's error was its assumption that "[m]alicious prosecution, whether civil or criminal, resembles defamation." 975 F.2d at 345. Beginning with this faulty premise, it then concluded that if "the injuries that defamation imposes do not constitute a deprivation of liberty or property within the meaning of the due process clause, then neither do the injuries that malicious prosecution imposes." *Id.* at 346. As support for this syllogism, the Seventh Circuit cited this Court's decision in *Paul v. Davis*, 424 U.S. 693, which forecloses a constitutional claim based *solely* upon reputational injury.

Three faulty assumptions underlie the Seventh Circuit's reasoning: (1) malicious prosecution is constitutionally analogous to and resembles defamation; (2) malicious prosecution does not lead to a deprivation of liberty and, therefore, does not respond to any constitutional injury; and (3) the calculation of damages under §1983 can never consider reputational injury. As demonstrated below, all three of these conclusions are incorrect.

A. Malicious Prosecution Is More Than Defamation

It must be noted at the outset that most federal courts, except for those in the Seventh Circuit and perhaps the Eighth Circuit[4], have accepted the proposition that malicious prosecution can be the basis for a §1983 claim. While all have recognized that a state actor must be involved to invoke §1983 (unlike the common law claim which has no such requirement), the majority of these courts have acknowledged that the abuse of state power associated with a malicious prosecution claim should be cognizable under §1983. *See, e.g., Brummett v. Camble*, 946 F.2d 1178 (5th Cir. 1991), *cert. denied*, __ U.S. __, 112 S.Ct. 2323 (1992)(constitutional malicious prosecution claim follows common law rules); *Posr v. Doherty*, 944 F.2d 91 (2d Cir. 1991)(state common law requirements applied to constitutional malicious prosecution claim); *Janetka v. Dube*, 892 F.2d 187 (2d Cir. 1989)(constitutional malicious prosecution claim can properly be brought where state actor instituted criminal charges against another party with malice and without probable cause, and when the proceedings terminated in plaintiff's favor); *White v. Frank*, 855 F.2d 956 (2d Cir. 1988)(same); *Robinson v. Maruffi*, 895 F.2d 649 (10th Cir. 1990)(constitutional malicious prosecution claim follows state common law requirements); *Goodwin v. Metts*, 885 F.2d 157 (4th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990)(continuation of criminal proceedings after evidence developed to show plaintiff innocent of crime established constitutional malicious prosecution case; policeman who supplied false information liable under §1983); *Wheeler v. Cosden Oil and Chemical Co.*, 734 F.2d 254 (5th Cir. 1984)(if state prosecutor brings charges without probable cause, such malicious prosecution is violation of due process); *Losch v. Borough of Parkesburg*, 736 F.2d 903 (3d Cir. 1984)(same); *Lee v. Mihalich*, 847 F.2d 66 (3d Cir. 1988)(constitutional claim follows common law rules); *Purdie v. Tierney*, 769 F. Supp. 864 (E.D.N.Y. 1991)(constitutional malicious prosecution claim requires showing of lack of probable cause and maliciousness); *Whelehan v. County of Monroe*, 558 F.Supp. 1093 (W.D.N.Y. 1983)(malicious prosecution claim against prosecutor states valid cause of action but prosecutor may have absolute immunity); *DiMaggio v. O'Brien*, 497 F.Supp. 870 (E.D.Pa. 1980)(abuse of process and malicious prosecution can be basis for §1983 claim); *Hand v. Gary*, 838 F.2d 1420 (5th Cir. 1988)(law enforcement officer violated plaintiff's constitutional rights by engaging in bad faith, malicious prosecution); *Strength v. Hubert*, 854 F.2d 421 (11th Cir. 1988)(malicious prosecution claim cognizable under §1983; Fifth Amendment violation); *Sheppard v. Byrd*, 581 F.Supp. 1374 (N.D.Ga. 1984)(malicious prosecution claim involving loss of livelihood does implicate constitutional claim). *Cf. Torres v. Superintendent of Police of Puerto Rico*, 893 F.2d 404 (1st Cir. 1990)(to bring a malicious prosecution action under §1983, the plaintiff must allege the elements of a common law malicious prosecution claim and must also allege that there was an egregious misuse of legal proceedings).

[4] In its recent decision in *Sanders v. Sears, Roebuck & Co, Inc.*, 984 F.2d 972, 977 (8th Cir. 1993), the Eighth Circuit held that "malicious prosecution can form the basis for a §1983 suit only if defendant's conduct also infringes some provision of the Constitution or federal law."

The Seventh Circuit's view that malicious prosecution causes nothing more than reputational injury is, at best, a theoretical construct that cannot be reconciled with the actual record complied in cases around the country. For example, in *Karim-Panahi v. L.A. Police Department*, 839 F.2d 621 (9th Cir. 1988), the authorities fabricated charges, falsified facts, destroyed evidence and strip-searched the plaintiff because of his race. In *Losch v. Borough of Parkesburg*, 736 F.2d 903, charges were maliciously filed to suppress criticism of a public offi-

cial's actions. In *Conway v. Village of Mount Kisco*, 750 F.2d 205 (1984), 758 F.2d 46 (2d Cir. 1985), *cert. dismissed sub nom. Cerbone v. Conway*, 479 U.S. 84 (1986), the plaintiff underwent seven hours of detention. In other malicious prosecution cases, the corruption of witnesses and falsification of evidence has led to the denial of a fair trial. *See generally Torres*, 893 F.2d at 410, and *Johnson v. Barker*, 799 F.2d 1396, 1400 (9th Cir. 1986).

Thus, malicious prosecution almost always involves reputational injury, as the Seventh Circuit recognized. But, contrary to the view of the Seventh Circuit, it frequently involves a great deal more. Indeed, because of the coercive nature of the criminal justice system, malicious prosecution represents a paradigmatic example of the misuse of governmental power.

As this Court emphasized only last year: "The Due Process Clause . . . was intended to prevent government from 'abusing [its] power or employing it as an instrument of oppression,'" *Collins v. City of Harker Heights, Texas*, __ U.S. __, 112 S.Ct. 1061, 1069 (1992), *quoting DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 196 (1989). The principle that redress is available under §1983 when such due process violations occur is central to our conception of federal rights and cannot be defeated by a misleading equation between malicious prosecution and defamation.

B. Petitioner Clearly Suffered A Loss Of Liberty As A Result Of The Malicious Prosecution In This Case

The court below concluded that there was no loss of "liberty" because there was no "punishment" inflicted on the petitioner. In doing so, it accepted an extremely crabbed view of the meaning of "liberty" under the Due Process Clause.

The term "liberty" is not coextensive with freedom

from punishment or incarceration. Rather, this Court has accepted the definition of "liberty " originally articulated in Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 542 (1961):

> "[L]iberty" is not a series of isolated points picked out in terms of the taking of property .... It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints .... and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

See also Planned Parenthood of Southeastern Pennsylvania v. Casey, __ U.S. __, 112 S.Ct. 2791, 2805 (1992); *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977).

A malicious prosecution inevitably entails a deprivation of liberty under this standard. By definition, an arrest is an "imposition" and "restraint." An arrest that lacks any evidentiary basis whatsoever -- as petitioner has alleged on the facts of this case -- is just as obviously a "substantial arbitrary imposition[] and purposeless restraint[]." It therefore offends our core conception of constitutional liberty.

In addition, the fact that petitioner was under court process for a significant period of time while free on bond resulted in other, additional restraints on his liberty. Under Illinois law and under the law in all states, persons freed under bond are severely restricted in their freedom of movement. Specifically, under Illinois' Code of Criminal Procedure, every person released on bail must agree to the conditions of a bail bond. The mandatory provisions of every bail bond are:

> §110-10. Conditions of bail bond.
>
> (a) If a person is released prior to convic-

tion, either upon payment of bail security or on his or her own recognizance, the conditions of the bail bond shall be that he or she will:

> (1) Appear to answer the charge in the court having jurisdiction on a day certain and thereafter as ordered by the court until discharged or final order of the court;
>
> (2) Submit himself or herself to the orders and process of the court;
>
> (3) Not depart this State without leave of the court; and
>
> (4) Not violate any criminal statute of any jurisdiction.

Ill.Rev.Stat., Ch.38, §110-10 (1987).

These conditions are very significant restraints upon a person's freedom of movement and ability to live one's life, *i.e.*, his or her "liberty." The Seventh Circuit remarked that while Mr. Albright was "confined" to Illinois, it was similar to Hamlet being confined to the "dungeon" of Denmark, 975 F.2d at 346. But the court's casual statement that Mr. Albright was not "punished" because he was not imprisoned, *id.* at 345, does not take into account the restraints on his life that the bail conditions established.

Thus, Mr. Albright wished to leave the state for a job interview in St. Louis. While such freedom is a matter of course to any other person, Mr. Albright would have had to hire a lawyer to make a proper motion, pay additional fees, wait until the court acted, and he still might not have succeeded in obtaining leave to cross state lines. *See* Petition for *Certiorari* at 45a. This was not "a modest infringement of liberty," as the court below concluded, *id.* at 347, it was a direct restriction on petitioner's right of interstate travel. *Cf. Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 901-03 (1986)(plurality opinion).

In other contexts, this Court has acknowledged that court orders that restrain a person's movements or freedom are significant restraints upon liberty. Thus, this Court has held that a person is in "custody" when he or she is free on detainer or bail for purposes of applying the federal habeas corpus statute, 28 U.S.C. §2254(d). *See Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973); *Peyton v. Rowe*, 391 U.S. 54 (1968). *See also Rose v. Morris*, 619 F.2d 42 (9th Cir. 1980).

The principle established by these cases is that detainer or restraint by court order or process is a meaningful interference with personal mobility and thus constitutes a deprivation of liberty. A person is "restrained" in that he or she may not travel beyond the limits established by the bond. If the bond conditions are allegedly violated, the bond may be forfeited and the person remanded, regardless of the later disposition of the underlying criminal charges. In short, the necessity of complying with bond conditions involves a significant interference with personal liberty.[5]

C. Reputational Injury Can Be Part Of The Calculation Of Damages Under §1983

The court below confused the difference between a constitutional cause of action and the injury created by unconstitutional conduct.

This Court held in *Paul v. Davis* that an action for

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[5] Moreover, once petitioner was arrested, a criminal file was presumably created that did not previously exist. The consequences of that record cannot be fully known. However, at the very least, expungement of the record is an appropriate remedy under §1983.

common law defamation cannot be converted into a §1983 lawsuit merely because the alleged tortfeasor is a state official. *Paul* does not hold that "reputational injury" may never be considered as part of a constitutional claim. To the contrary, *Paul* approvingly cites a series of decisions in which "reputational injury" formed a significant element of plaintiff's constitutional claim. *See, e.g., Goss v. Lopez*, 419 U.S. 565, 574-75 (1975); *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971); *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123 (1951).

What distinguishes *Paul* from this line of cases is that, in *Paul*, the plaintiff alleged *only* reputational injury. His complaint, as this Court noted, failed to "assert [the] denial of any right vouchsafed to him by the State and thereby protected under the Fourteenth Amendment." 424 U.S. at 712. Here, by contrast, petitioner has alleged significant restraints on his personal liberty flowing from his malicious prosecution claim. Under these circumstances, the *Paul* analysis, relied on so heavily by the court below, simply does not apply.

III. RELEGATING ALL MALICIOUS PROSECUTION ACTIONS AGAINST STATE ACTORS TO THE STATE COURTS WOULD UNDERMINE, NOT ENHANCE, IMPORTANT FEDERALISM VALUES

This Court has emphasized that §1983 was not designed to mirror state common law claims when the defendant happens to be a state actor. The Fourteenth Amendment does not give every person a right "to be free of injury wherever the state may be characterized as a tortfeasor." *Paul v. Davis*, 424 U.S. at 701. "Such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Id.* Thus, it is clear that the Constitution is not violated if a

state actor driving a state-owned car on business accidentally runs over an individual. State tort law is more than sufficient to afford a remedy.

But, by the same token, when a state actor deliberately misuses significant state machinery to charge a person with a criminal offense, that is not "merely" a state tort. As one commentator has noted:

> injuries inflicted by public officers can be thought to differ significantly from injuries inflicted by private persons. Backed by state power and apparent authority, such officials threaten core societal notions of human dignity through their misconduct.

See Monaghan, "State Law Wrongs, State Law Remedies and the Fourteenth Amendment," 86 Colum.L.Rev. 979, n.88 (1986).

Accordingly, this Court has often acknowledged "the paramount role Congress has assigned to the federal courts to protect constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974); *Patsy v. Board of Regents*, 457 U.S. 496, 500 (1982). Section 1983 is perhaps the most important vehicle for the vindication of those rights in the federal system. Many constitutional claims brought under §1983 have parallel state torts. Yet, this Court has repeatedly held that "[t]he federal remedy [under §1983] is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe v. Pape*, 365 U.S. at 183. *A fortiori*, the federal remedy should not be denied altogether because the same challenged conduct caused nonconstitutional injuries that might have been remedied in a state law proceeding.

In short, the decision below does not promote the interests of federalism. Instead, it simply substitutes its view of federal-state relations for the view adopted by the 42d Congress when it enacted §1983. This Court should not sustain that exercise in judicial redrafting.

CONCLUSION

For the reasons stated above, the judgment below should be reversed.

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